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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE ROGER BARTH,

Appellant,

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

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QUESTIONS PRESENTED

1.) Does the challenged statutory scheme infringe upon any fundamental right of the appellant?

2.) Do the privacy rights of the natural parents overcome appellant's alleged constitutional rights to access to the information?

3.) Does the challenged statutory scheme create a suspect classification for equal protection considerations?

4.) Is there a rational basis for the challenged statutory scheme?

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IN RE ROGER BARTH,

Appellant,

v.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT ON APPEAL

STATEMENT OF THE CASE

The Appellant, an adult adoptee, filed a petition in the Circuit Court of Cook County, Illinois seeking to have the Court order the Clerk to open to him the sealed records of the petitioner's adoption. The trial court denied relief (App. 65) and the Illinois Appellate Court affirmed the trial court decision. The Illinois Supreme Court again affirmed the decision on March 18, 1981 (App. 1). The courts all concluded that the adoption records could be opened for "good cause" but that simply achieving adulthood does not constitute such a good cause.

MOTION TO DISMISS OR AFFIRM

The appellee hereby moves to dismiss the appeal on the ground that it does not present a substantial federal question, and that the judgment rests upon an adequate non-federal ground. In the alternative, appellee moves to affirm on the ground that the questions presented are so insubstantial as not to need further argument.

The appellant takes the position that his adulthood constitutes sufficient "good cause" to support the opening of his sealed adoption records. He further asserts that if it is not deemed good cause then the statutes in question are unconstitutional. He makes little effort in his brief to deal with the competing rights of the other parties to the adoptive process. His position is that his rights are paramount to those of all others. The Clerk of the Circuit Court of Cook County, Morgan M. Finley, is the keeper of the records in question. He has attempted to fairly raise the competing concerns which must be evaluated before a court can make a considered judgment.

Two of the appellant's arguments are that other states/countries permit adult adoptees to view their birth records and that many sociologists think that having open records is the better practice. These arguments miss the mark as they are made to the wrong audience. Only the Illinois General Assembly has the right to weigh the sociological arguments and change state policy. Thus, there is an adequate state basis upon which the decision rests, that is, that the legislature exercised its judgment to maintain confidentiality instead of allowing the records to be open. The appellant argues that since some other countries and three states allow the records to remain open, Illinois could have

elected to have done so and it would be the more enlightened practice. However, establishment of such a state policy is intrinsically an independent, non-federal basis for the law and the Illinois Supreme Court accepted that policy as an appropriate justification (App. 9).

I.

THE CHALLENGED STATUTORY SCHEME DOES NOT INFRINGE UPON APPELLANT'S FUNDAMENTAL RIGHTS.

Appellant claims that the denial of access to the sealed judicial records of his adoption impairs his fundamental rights. Yet nowhere in his brief are those rights ever clearly defined. An adoptee's desire to learn about his genetic parents is understandable, but his curiosity, absent medical, psychiatric or other necessity, cannot override the very substantial rights of other parties to the adoption and the necessity to protect the integrity of the adoptive process itself.

While the First Amendment protects the right to receive information and ideas, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the access to such information is not absolute but subject to restrictions commensurate with its nature, *Pell v. Procunier*, 417 U.S. 817, 832 (1974); CF. *Kleindienst v. Mandel*, 408 U.S. 753, 752-63 (1972). In order to receive the Court's protection the passing of information from one person to another must be concerned with the marketplace of ideas, *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), or with securing long recognized constitutional rights.

In support of his claim, the appellant has cited cases in which the interchange of ideas and materials was

insured only because of correlative constitutional claims. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court viewed the right to receive information in the context of freedom of speech and press, but that right to receive information was coupled with the accepted fundamental right to privacy. The court protected the private possession of obscene matter.

Marital privacy, coupled with the freedom of speech within the "spectrum of available knowledge," provided the Court's protection to a married couple's access to birth control information and devices in *Griswald v. Connecticut*, 381 U.S. 479 (1965). In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), censorship of films containing mere nudity was struck down because its overbroad application proscribed freedom of speech and expression. Freedom of the press, coupled with the right to access to social, political, moral and other ideas protected the right to express an opposing viewpoint in radio broadcasts in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

A reading of the cases presented by appellant in support of his contention that there is a fundamental right to information clearly supports only the proposition that the courts will try to afford the free flow of ideas and information in furtherance of some other fundamental right.

The United States Court of Appeals for the Second Circuit addressed the same claim as is presented in the case at bar in *Alma Society, Inc. v. Mellon*, 601 F.2d 1225 (2nd Cir. 1979) *cert. denied* 100 S.Ct. 531. That Court deemed the fact that other people's interests were involved was an important factor in evaluating the statute:

> ". . . a state may take into account the relationship of the adopting parents, even if, as appellants

> assert, many of them would not object to or would even encourage the adopted child's seeking out the identity of or relationship with a natural parent. The New York statutes in providing for release of the information on a 'showing of good cause' do no more than to take these other relationships into account. As such they do not unconstitutionally infringe upon or arbitrarily remove appellants' rights of identity, privacy, or personhood." (at 1233)

After considering the competing rights of the natural and adoptive parents, there was little left to support appellant's claim.

> "We could readily take a 'pigeon-hole' approach and in doing so, because appellants' novel claims do not fit into any as yet recognized category of 'privacy,' exclude them. For example, there is not involved a general 'individual interest in avoiding disclosure of personal matters,' *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). Although it could be argued that appellants do have an 'interest in independence in making certain kinds of important decisions,' *id.* at 599-600, 97 S.Ct. at 876 that categorization still would leave the question whether in a situation involving both natural parents and adoptive parents the adult adoptee should have 'independence' in determining whether he or she shall obtain knowledge of the natural parents."

The Court concluded that there was no fundamental right involved.

In order to receive First Amendment protection, the sought after information must be ideas and materials already within the public stream. For example, appellant cites *Cox Broadcasting v. Cohn*, 421 U.S. 469 (1975), where the Court allowed the name of a rape victim to be published in a local newspaper. However, that information was already available to the public through unsealed court records, unlike the sealed records of

adoption information. In *Cox*, the court pointedly relied on the existing public nature of the records in allowing its publication:

> "By placing the information in the public domain in official records, the State must be presumed to have concluded that the public interest was thereby being served . . . In preserving that form of government the First and Fourteenth Amendments command nothing less than that the State may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." 420 U.S. 469, 495 (1975).

An application for access to confidential information must be tempered by the purpose of the First Amendment, *viz*, the dissemination of ideas and information of public interest, *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222 (1975). The right of access to judicial records has never been considered absolute and courts have always exercised the power to seal their records when deemed necessary. The Court records to which appellant seeks access are gathered under a scheme of adoption laws, and are a product of the judicial process. In the exercise of a valid state interest in protecting the rights of all the parties involved, the records are sealed to all. The First Amendment does not guarantee a Constitutional right of special access to information not available to the public generally, *Branzburg v. Hayes*, 408 U.S. 665 (1972), *Zemel v. Rusk*, 381 U.S. 665 (1972). There is no decided case which even hints that the First Amendment is a constitutional "freedom of information act." In fact, the case law resoundingly refutes that suggestion.

II.

THE PRIVACY RIGHTS OF THE NATURAL PARENTS AT LEAST EQUAL IF NOT OVERCOME THE PETITIONER'S RIGHT TO KNOW.

Any right to know must be balanced with the right to privacy and the right to privacy is the weightier of the two claims. Although the Constitution does not explicitly mention any right of privacy, the Court has recognized that one aspect of the liberty protected by the Fourteenth Amendment is a right of personal privacy, *Carey v. Population Services*, 431 U.S. 678 (1977), *Roe v. Wade*, 410 U.S. 113 (1973). The decision of whether or not to bear a child is an example of the kind of concern constitutionally entitled to the right of privacy, *Carey v. Population Services, supra*; *Roe v. Wade, supra*; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). This privacy right extends to an individual's liberty to make choices as they regard contraception and child-bearing, *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Just as the Court protects the freedom of choice and privacy with respect to child bearing in terms of abortion, they must also protect the freedom of choice and privacy in terms of adoption. In an adoption, the natural parents sever all present and future rights and interests in the child; Ill. Rev. Stat. 1977, ch. 40, §1521; *In Re Cech*, 8 Ill. App. 3d 642, 291 N.E.2d 21 (1972); *In Re Petition of Jollay*, 22 Ill. App. 3d 151, 319 N.E.2d 287 (1974). Today natural parents surrender their child for adoption with not merely an expectation of confidentiality, but with an actual statutory promise that their identity as the child's natural parents will be kept sealed, Ill. Rev. Stat. 1977, ch. 40, §1522. "Thus, the natural parent has a right to privacy, a right to be let alone that is not only expressly assured (by statute) but also has been recognized as a vital interest by the United States Supreme Court, *Stanley v. Georgia*, 394 U.S. 557 (1969),"

The Alma Society, Inc. v. Mellon, 459 F. Supp. 912 (D.C. N.Y. 1978).

This "right to be left alone" has been recognized by the Supreme Court as the keystone to all other freedoms. Justice Douglas described its importance in *Public Utilities Comm'n. v. Pollak*, 343 U.S. 451 (1952).

> "Liberty in the constitutional sense must . . . include . . . privacy . . . The right to be left alone is indeed the beginning of all freedom."

Hence, the natural parents have both a statutory and a constitutional right to be left alone.

The appellant, in essence, seeks to exercise the protective shield of privacy as a sword. Here he seeks to initiate the flow of information rather than limit the flow. The information concerns not simply a detail of his individuality, but the details of the individuality of his natural parents. Privacy rights protect the adoptive parents as well as those adoptees who wish to curb the flow of information concerning the details of their individuality.

While appellant acknowledges a compelling reason to prevent access to the adoption records while he was a minor, he claims that all such interests abate once he becomes an adult. While the attainment of majority is a significant event in the adoptee's life, it occurs independently of either the natural family relationship or the adoptive one and does not affect either the termination or the continuation of those relationships. Those parents' expectations do not end nor does their legal status change because the adoptee becomes an adult. The rights of the adoptee must always be viewed together with the rights of the natural and adoptive parents. The integrity of the adoptive process is built upon the assurance of confidentiality to all parties. Surely the natural parents do not waive their privacy rights by giving up their child for adoption.

The legislature has determined that the goal of encouraging the supply of adoptive parents, providing permanence to the adoptee's life, and preventing interference by either set of parents is best attained by finality to the adoptive process, that is, closing the files. The wisdom of that determination is not before this Court.

In light of the fact that parental rights are not only surrendered voluntarily but sometimes severed by the Court because of neglect or abandonment, it is critical to safeguard against casual disclosures. Upon the entry of an order of adoption sealing the court file, the natural parents no longer have a legal parent-child relationship. They do, however, have a vested expectation of privacy and anonymity. Permitting the adoptee to intrude upon that privacy without even notice to natural parents violates their due process rights. Barring good cause, the legislature has determined that those records should be sealed forever. Appellant is hard pressed to prove that his curiosity, without more, justifies the potentially traumatic result from the sudden reappearance of a child given up for adoption so many years before.

The appellant attempts to minimize the privacy rights of his natural and adoptive parents by stating that his adoptive mother supports his search for his natural parents (Brief, p. 25) and that his natural mother is said to have inquired into his well-being a year after birth (Brief, p. 9). Both of these casual observations demand further scrutiny.

The adoptive mother is asked by the appellant whether or not she supports his search for his natural parents. She does not relish the prospect of him finding them for fear that his affections for her will be diluted or diminished. Yet she dare not say no. If she appears to resist his search he will resent her for that with the natural

consequence of increased disaffection between the two. She reluctantly agrees. Is her concurrence freely given?

The appellant also recites the hearsay statement that his adoptive mother told him that his natural mother inquired about him approximately a year after the adoption. Assuming that this is true, the implication that she therefore wants to have a reunion with him is wholly unwarranted. If she were sixteen years old and unmarried then, she would be close to fifty years old now and probably married with an extended family. It would take an enormous leap of faith to conclude that she would want him to unexpectedly appear at her front door tomorrow. The impact on her personally and her marriage and family could range from surprise to personal catastrophy. We cannot ignore the privacy concerns of the natural parents.

III.

APPELLANT'S STATUS AS AN ADOPTEE DOES NOT PLACE HIM WITHIN A SUSPECT CLASSIFICATION.

Appellant contends that "strict scrutiny" of the Illinois adoption statute be applied when determining its constitutionality for the reason that the statute places adoptees within a "suspect" classification. He suggests that adoptees are discriminated against because only they must secure a court order to obtain birth records and that such a classification is inherently suspect. However, adoption is not a "status at birth" classification. The adoptee's status is derived from a legal proceeding, with concomitant regulations regarding that status, *Mills v. Atlantic City Dept., supra.*

Appellant relies upon Supreme Court decisions which have examined classifications based on race, national origin, sex and illegitimacy. However, only two classifi-

cations have been designated as suspect: race, *Loving v. Virginia*, 388 U.S. 1 (1967), and alienage, *Graham v. Richardson*, 403 U.S. 365 (1971). Developing decisions have added a middle tier of scrutiny. In *Kahn v. Shevin*, 416 U.S. 351 (1974), the Court distinguished its decision in *Frontiero v. Richardson*, 416 U.S. 677 (1973), and has applied a "fair and substantial" test to classifications based on sex and illegitimacy. *See, Schlesinger v. Ballard*, 419 U.S. 498 (1975) and also *In re Estate of Karas*, 61 Ill. 2d 40, 329 N.E.2d 234 (1975).

Adoptees would nonetheless fall into a minimal scrutiny analysis as they suffer none of the earmarks of these systematically deprived classes: 1) Stigmatized as inferior; 2) discrete and insular minorities; 3) socially and legislatively powerless, politically disadvantaged; 4) accident of birth (despite appellant's post-birth arguments); or 5) that laws have been used in the past to discriminate, *Graham v. Richardson, supra*; *Mathews v. Lucas*, 427 U.S. 495 (1976). The classification of adopted children thus lacks the traditional indicia of being suspect. Further the class of adoptees are not disadvantaged by an accident of birth but their status is created by statutory authority in order to obtain special benefits, that is, to become the legal child of another. The adoptee thus obtains new rights of support, care, protection and inheritance. Through this process the adopted child becomes entitled to the same rights and privileges as other children. The scheme also provides the adoptive family with the same autonomous environment traditionally afforded other families.

Adopted children are not relegated to a position of political powerlessness requiring extraordinary protection from the majoritarian political process, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The adoptee group may contain among them racial minorities and illegitimate children but that in

and of itself does not make adoptees a suspect classification; and in the case of illegitimates, the equality of treatment among their peers is insured by sealing their adoption records, and thus any knowledge by outsiders of the circumstances surrounding their birth is prevented. Additionally, adopted children are not marked with immutable characteristics which by their very existence have been the basis of unfair treatment.

The requirement of a Court Order to view original birth records does not subject adoptees to invidious discrimination. Equal protection does not require that all persons be treated equally. *McGowan v. Maryland*, 366 U.S. 420 (1961). The Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways, it only prohibits different treatment on the "basis of criteria wholly unrelated to the objective of that statute," *Eisenstadt v. Baird*, 405 U.S. 438, 447, 92 S.Ct. 1029, 1035 (1972).

> "The classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike," *Royal Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920).

The alleged social desirability of an adoptee ascertaining his natural lineage is not the critical determinant for subjecting state legislation to strict scrutiny. The key to discovering whether the interests of an adult adoptee in determining his natural identity are entitled to constitutional protection lies in assessing whether there is such a right explicitly or implicitly guaranteed by the Constitution, *see, Dandridge v. Williams*, 397 U.S. 471 (1970). Virtually every statute affects important rights, *Shapiro v. Thompson*, 394 U.S. 618 (1969). Adoptees simply are not members of a suspect classification and the statutory scheme in question must only

be rationally related to the purpose intended for it to pass constitutional muster. Not one of the many cases cited by appellant establishes his inclusion in a suspect class.

IV.

A RATIONAL BASIS EXISTS FOR THE STATUTORY SCHEME IN QUESTION.

"The State has more than a rational basis, it has a compelling interest in regulating the access sought here," *Mills v. Atlantic City Dept. of Vital Statistics, supra*, p. 653. The Illinois laws have been designed to balance the rights of all the differing interest groups. The statute merely sets up a hearing procedure whereby all the competing rights can be evaluated. The statute does not deny all access to information, it requires that one must demonstrate good cause to gain access in order to protect the conflicting privacy rights of the others involved. Such a limitation is within the rational state policy of protecting the privacy rights of its citizens and non-citizens alike who enter its courts, and seek its protection. The scheme places only a reasonable limitation on access to sealed adoption records.

Appellant cites numerous articles purporting to show how adversely the adoption process affects children handled within its systems. However, generations of Illinois youths have found homes and new beginnings through the adoption courts. Natural parents have been encouraged to participate through the guarantee of anonymity. Adopting parents have been assured that their place as parents will be protected from reconsidering, regretful, or even vengeful natural parents. The children themselves have been guaranteed a fresh opportunity by sealing forever the accidents, or regretted beginnings of their life. Indeed, some children may suffer

serious adverse effects from the facts underlying their adoption.

Some adoptees may need to know medical or psychological facts about their parents. The statute provides a means for them to know. The statutory provision vests in the court the power to weigh and balance the competing privacy rights and make a determination based on the facts and circumstances of each individual case.

The fact that some reunions with natural parents have been successful, does not diminish the reality that other meetings, forced or unexpected as they may be, have had a damaging and irreparable effect on the adoptee, natural parents and adoptive parents alike. Each story, successful or heartbreaking, reflects in its individuality the necessity to retain a case by case approach. The state's interest is fourfold: protection of the adoptive child, the natural parents, the adopting parents and the adoptive process. Making adoption records confidential except upon a showing of good cause represents a thoughful balance between many competing interests.

In *Application of Sage*, 586 P. 2d 1201 (Wash. 1978), the Court of Appeals of Washington upheld an adoption statute similar to the one here. In so holding, the Court found persuasive the argument set out in *Genealogical Information in Adoption: The Adoptee's Quest and the Law*, 11 Family Law Quarterly 185, 196 (1977):

> "The primary interest of the public is to preserve the integrity of the adoptive process. That is, the continued existence of adoption as a humane solution to the serious social problem of children who are or may become unwanted, abused or neglected. In order to maintain it, the public has an interest in assuring that changes in the law, policy or practice will not be made which negatively affect the supply of capable adoptive parents or the willingness of

biological parents to make decisions which are best for them and their children. We should not increase the risk of neglect to any child, nor should we force the parents to resort to the black market in order to surrender children they can't care for."

The Supreme Court of Missouri in *Application of Maples*, 563 S.W. 2d 760 (1978) sustained a similar adoption statute finding that "the primary concern of the state must be to protect and foster an efficient scheme for adoption, thus serving the best interest of the child." 563 S.W. 2d at 763.

The Illinois General Assembly weighed and considered the variables and possibilities. It made a reasoned choice in how best to deal with an intractable problem. It made policy determinations. All of those functions are uniquely legislative. The appellant encourages this Court to reevaluate our current adoption process. Such a reevaluation might be a good idea, but this Court is not the vehicle with which to do it. Only the Illinois General Assembly may reconsider our state enunciated policies concerning adoption. Appellant's call for this Court to act beyond its authority must fall on deaf ears.

CONCLUSION

No court has yet held that adoptive persons have a constitutional right to inspect their court files simply upon reaching majority. By urging this type of *ex parte* proceeding they must acknowledge that the natural parents would also have an unfettered right to search them out. The consequences of such a policy could be disastrous in many instances. Unhappy adoptees could seek out

and publicly revile their natural parents for having abandoned them. Guileful natural parents could track down their long forgotten child and seek to have him support them at the expense of such care to the adopting parents.

The potential abuses of such information are beyond the scope of appellee's imagination. *Some* good cause must be shown by the child (or the natural parent) for the court to take the risks inherent in opening the court files. Doing so on an *ex parte* petition violates anyone's concept of fair play. This Court must not tinker with so volatile a situation. This is particularly so when it is best dealt with in a legislative fashion.

The appellant has failed to demonstrate any unconstitutional treatment afforded him by the state. Consequently, the Illinois Supreme Court's decision must be affirmed.

Respectfully submitted,

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